Supreme Court, U.S.
FILED
JUL 23 1999
OFFICE OF THE CLERK

No. 98-1662

In The
Supreme Court of the United States

October Term, 1998

ROBERT D. ALEXANDER,

Petitioner,

vs.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION
with Appendix

GEORGE V. WARREN
Counsel of Record
847 W. Willow, Nandy House
Lansing, Michigan 48906
(517) 484-5050

Attorney for Petitioner

July 23, 1999

QUESTIONS PRESENTED FOR REVIEW

I. Whether state employee Petitioner's right to Equal Protection was violated by the unequal and more severe penalty imposed on state and local employees, **removal with an eighteen month debarment**, being 5 U.S.C. §1505 (2) and §1506 (a)(1) and (2), *versus* the lesser penalties for federal employees, **varying from removal with no debarment to suspension without pay for not less than 30 days**, being 5 U.S.C. §7326, for the same violation of the Hatch Political Activity Act (Hatch Act or the Act) -- candidacy for partisan elected position? This question is crucial in that the federal Administrative Law Judge recommended that Petitioner not be penalized after hearing three days of testimony, especially due to improper actions or inactions by the Office of Special Counsel (OSC), the prosecutorial arm of the Act.

II. Whether Petitioner State Employee's right to Due Process was violated by the Merit Systems Protection Board (MSPB or the Board) refusal to recognize the sanctity of Michigan's civil service mandated 60-day unpaid leave for partisan candidacy?

III. Whether Petitioner's request for an Olenhouse Hearing on his Motion to Dismiss should have been granted by the District Court?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Authorities	iii
Citations to Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Reply Statement to New Points Raised in the Brief in Opposition	2
1. Respondent purposely misstated the Board's order to the state to "dismiss" its employee instead of "remove," the statutory word that appears three times in the cited sections.	2
2. Respondent purposely misstated Petitioner's challenge to the Board's suspension of three federal employees after the OSC formally warned each not to violate the Hatch Act again.	2
3. Respondent erred in several crucial assertions against Petitioner.	5
4. Respondent's Brief in Opposition did not conform to Supreme Court Rules requiring accurate statements and tried to hinder the Court's consideration of Petitioner's clear and verified appeal.	6
ARGUMENT	7
1. The Board's pattern and practice clearly refutes Respondent's misstatements that the Board	
a. decides harsher penalties for federal employees,	
b. Could not have imposed a lesser	

penalty on Petitioner if he had been a federal employee, and
c. Has an identical standard of culpability for both federal and state employees. 7
2. Respondent purposely reiterates factual misstatements by the Board, District Court, and Appeals Court, which Petitioner correctly and extensively documented in initial briefs to the District and Appeals Courts. 9
3. Respondent purposely misstates significance of the different *Olenhouse* interpretations by the Fifth, Sixth and Tenth Courts of Appeals. 10

CONCLUSION 10

APPENDIX F - Citation of Supplemental Authority filed October 23, 1998, in U.S. Court of Appeals for the Sixth Circuit A 1

APPENDIX G - Petitioner's Formal Objections to MSPB's Factual Findings in Final Decision filed March 27, 1997, in U.S. District Court for the Western District of Michigan, and filed March 4, 1998, in U.S. Court of Appeals for the Sixth Circuit A 4

TABLE OF AUTHORITIES

U.S. Constitutional Amendment **Page**

5th Amendment 1
14th Amendment 1

Federal Statutes

Hatch Political Activity Act,
5 U.S.C. § 1501 et. seq. i, 1, 2
5 U.S.C. § 7321 et. seq. i, 1, 2

Title 28, U.S.C. § 1254(1) 1

Fed. Railroad Adm. Drug Testing Program Regulations
49 C.F.R. Ch. VI, § 635.25-.37 2

Federal Cases

Olenhouse v. Commodity Credit Corp.,
42 F. 3d 1560 (10th Cir. 1994) i, 10

M.S.P.B. Decisions

All MSPB Decisions ordering penalties during 1984-97 are listed in chronological order in Appendix E at A 58. MSPB decisions cited in the Reply Brief are:

Special Counsel v. Alexander (Appendix C at A 35)
[71 M.S.P.R. 636 (1996)] 1-10

S. C. v. Andrezjwski [63 M.S.P.R. 495 (1994)] 7, 8, 10

S. C. v. Baker, [75 M.S.P.R. 155 (1997)] 3-4, 6-8

S. C. v. Bradford, [71 M.S.P.R. 441 (1996)] 7, 8, 10

S. C. v. Campbell [58 M.S.P.R. 170 (1993)] 3, 6-8

S. C. v. Camey, [31 M.S.P.R. 32 (1986)] 7

S. C. v. DeMeo, [77 M.S.P.R. 158 (1997)] 5-6

S. C. v. Dominguez, [55 M.S.P.R. 652 (1992)] 7

S. C. v. Edenfield, [52 M.S.P.R. 327 (1992)] 3, 6-8

S. C. v. Johnson, [31 M.S.P.R. 32 (1986)] 7

S. C. v. Purnell, [37 MSPR 184 (1988)] 5

S. C. v. Reckard [77 M.S.P.R. 651 (1998)] 7, 10

S. C. v. Walker, [67 M.S.P.R. 271 (1995)] 7, 8, 10

PETITION FOR WRIT OF *CERTIORARI*

Petitioner, Robert Alexander, respectfully requests that a writ of *certiorari* be granted to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case filed on January 21, 1999.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (Pet. App. A1 - A20) is reported at 165 F.3d 474. (File: 99a0020p.06) The opinion of the United States District Court for the Western District of Michigan is unreported (Pet. App. A21 - A34). The final decision and order of the United States Merit Systems Protection Board (Pet. App. A35 - A44) is reported at 71 M.S.P.R. 636. The recommended decision of the federal administrative law judge is unreported (complete copies of the 72 page decision were lodged in with the Clerk of the Supreme Court; pages 56-57, 63, 65-72 are in Pet. App. A45 - A57).

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The judgment of the Court of Appeals was entered on January 21, 1999. The petition for a Writ of *Certiorari* was filed on April 14, 1999. The Brief for the Respondent in Opposition was filed July 14, 1999. This Court has jurisdiction pursuant to Title 28, United States Code §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- Fifth Amendment to the United States Constitution.
- Fourteenth Amendment to the United States Constitution.
- 5 U.S.C. §7326, Hatch Act federal employee penalty.
- 5 U.S.C. §1505 and 1506, Hatch Act state and local employee penalty.

REPLY STATEMENT TO THE NEW POINTS RAISED IN THE BRIEF IN OPPOSITION

1. Respondent purposely misstated the Board's order for the State to "dismiss" its employee instead of "remove," the statutory word that appears three times in the cited sections, 5 U.S.C. §1505(2) and 1506(1) and (2).

Congress, the Courts, and the Solicitor General are familiar with the various procedures contained in the word "remove," which are vastly less punitive than "dismiss," which was used in the Respondent's biased explanation of the state employee's penalty. Res. 2, line 29. The Board has interpreted "remove" to mean "dismiss" for federal employees. The Board has applied its federal employee "dismiss" interpretation to state employees, although the Act §1508 requires the suspension of the state employee during the appeal process.

The recent Federal Railroad Administration Drug Testing Program Regulations explained "removed" as temporarily precluded "from performing his or her safety-sensitive function" while able to do other work and take drug counseling, and "evaluation and rehabilitation" while working, or during a suspension and then return to work. (49 CFR Ch. VI, §653.25-.37) The Solicitor General's explanation limiting the State's options to "dismissing" its employee or foregoing federal funds is inaccurate and misleading. Per §1508 the State should have suspended Petitioner without pay for the 18 month penalty period while Petitioner appealed his suspension to the District Court and Circuit Court of Appeals, and satisfied the "removal" order of the Merit Systems Protection Board, §1505(2).

2. Respondent purposely misstated Petitioner's challenge to the Board's suspension, instead of the dismissal penalty suffered by Petitioner, of three federal employees who were formally warned not to violate the

Hatch Act again, and each disregarded the formal warning by conducting another partisan candidacy.

The essence of Petitioner's major challenge to the Board's unconstitutional pattern and practice of enforcing the Hatch Act is that the Board orders the removal of state employees who commit the same violation of the Act as federal employees, for whom the Board usually orders only a 30-90 day suspension. The Board's arbitrary and capricious pattern is best demonstrated in its handling of three federal employees that Respondent mistakenly described near the end of its Brief: *SC v Baker,* 75 M.S.P.R 155; *SC v Campbell*, 58 M.S.P.R. 170; and SC v *Edenfield*, 52 M.S.P.R. 327. Res. 18, footnote 11. All were elected partisan candidates: Baker before federal employment in 1993, and Campbell and Edenfield after years in federal service. The OSC formally warned Campbell and Edenfield that their campaigns violated the Act and they should not run again; Baker was warned by the Veteran Administration upon employment that she could not run again without violating the Act. Yet, despite the OSC's and VA's formal warnings, all ran again in partisan campaigns!

Amazingly, the OSC did not demand that the Board order dismissal for these federal employees who violated the Act a second time after being formally warned about violations. Instead, OSC crafted settlement agreements for suspensions (Baker 90 days; Campbell and Edenfield 30 days each), and the agreements were mistakenly supported by the Administrative Law Judge. The Board rightly rejected the Baker agreement and remanded it back for further proceedings in 1995, but did approve the suspensions for Campbell and Edenfield. The Board's statements in each of these three decisions demonstrate the arbitrary and capricious nature of its decisions, and highlight the dismal summations the Respondent provided in footnote 11.

Respondent's footnote ignored the fact that all three

were formally warned. The degree to which Respondent clearly neglected pertinent facts is verified in its statement that "In Baker...the action was dismissed, the Hatch Act complaint was not adjudicated, and no penalty issues were addressed." The extent Respondent misstated the *Baker* case is established by Board member Amador's concurring opinion to the Board's 1997 *Baker* decision:

> In a unanimous 1995 opinion, the Board rejected the CALJ's recommended decision...[the] Act precluded [the Board] from accepting...that removal is not warranted and that a 90 day suspension is appropriate...For whatever reason (and I suspect that the parties realized that this case lacked any mitigating circumstances beyond the...factors which had been previously recognized by...the Board), the parties entered into another settlement agreement. This time, however, they did not seek to have the Board enter the ...agreement into the record for enforcement. Instead, they merely filed a motion to dismiss the complaint with prejudice....I **believe that the Special Counsel's exercise of this discretion in the instant case calls into question her commitment to the mandate of the Hatch Act....**
>
> Off the football field, an end run is defined as an **"evasive trick." I can find no better definition for the Special Counsel's action in this case**. Faced with a clear and knowing violation of the Hatch Act and aware...the Board would not accept a penalty short of removal unless there were additional mitigating factors that had not been previously entered into the record, **the Special Counsel has abrogated her responsibility under the Hatch Act**...the Board lacks the power to negate this decision or to take any action other than a dismissal of the complaint... (*Baker*, 75 MSPR. 156-158)

Board member Amador's criticism of the OSC is crucial in this case in that the federal ALJ recommended Petitioner

not be penalized after hearing three days of testimony, especially due to improper actions or inactions by the OSC. Pet. A49-A51, A53-A57.

Since 1984 cases have come before the Board of state employees campaigning while on State leaves of absence. Since then the Board has ordered removal for 23 of 25 state employees who were partisan candidates (not one was excused from penalty due to the *Purnell* mitigating circumstances), whereas the Board has ordered removal for only 3 of 10 federal employee "partisan" candidates. (*Purnell*, 37 MSPR 184 (1988)) Pet. 15, 24, A58-A62.

3. Respondent erred in several crucial assertions against Petitioner.

Respondent is wrong that Petitioner "...cited *DeMeo* for the first time *after* argument in the court of appeals." Res. 17, footnote 10, lines 10-13. Petitioner filed the Citation of Supplemental Authority on October 23, 1998, and Oral Argument in the Court of Appeals took place on October 29, 1999. (See Petitioner Brief in Response (BR), Appendix F, BR A1- A2) Respondent is incorrect in his criticism "...even though *DeMeo* was decided before petitioner filed his opening brief." The Board issued *DeMeo* December 22, 1997, and Petitioner filed his opening brief seven days later. Few in Washington DC know Board decisions that quickly. In the State of Michigan Law Library the most recent US MSPB Reporter is volume 80, and its most recent decision is February 9, 1999. Also, Respondent is inaccurate to criticize that "...*DeMeo* is hardly settled law." The *DeMeo* decision was scholarly and extensive, and is crucial to this case in that it so clearly demonstrates the Board's misapplication of the Hatch Act statute and the need for Supreme Court consideration of this situation.

Respondent clearly erred in asserting that Congress provided for a broader range of penalties for federal

employees because the Act prohibits more activities for federal employees. Res. 15, lines 1-5. Congress provided for broader federal penalties in the early 1960s. Pet. 27. State and federal employees were prohibited from the same activities until the early 1970s. Pet. 5, A47.

4. Respondent's Brief did not conform to Supreme Court Rules requiring that statements be accurate and tried to hinder the Court's consideration of Petitioner's clear and verified appeal.

Respondent's footnote 12 on page 21 criticized Petitioner because he did not "explain what was omitted from the record." The reason that Petitioner requested an *Olenhouse* hearing was to verify that all of the briefs and documents in this case were actually in the record. Prior to Petitioner's Olenhouse request, the OSC had "lost" Petitioner's Trial Brief, the MSPB "misplaced" Petitioner's Exhibit 4" binder, and then the MSPB sent the Official Record to the District Court in a disheveled condition. However, the District Court denied Petitioner's request for an *Olenlhouse* hearing. Thus, Petitioner was unable to find out exactly what included or missing. Pet. 22, see listing of Alexander's mitigating circumstances including these problems, A 58.

Respondent incorrectly cited the U.S. Merit Systems Protection Board Reporter as "M.S.P.B." instead of its actual cite as "M.S.P.R." Pet. IV, 12, 16-18. This may appear inconsequential, but when correlated with misstatements as described on *Baker, Edenfield, DeMeo* and *Campbell*, such Respondent confusion as to where the Court finds a citation to verify a statement can hinder the Petitioner's case.

Also, Respondent stated on page 4, lines 5-7, "At no time was petitioner ever told that he could be a candidate without violating the Hatch Act. Ibid." That statement is cited as being on page 4 of Petitioner's Brief, but it does not appear on pages 3 through 5 of the Brief.

ARGUMENT

1. The Board's pattern and practice clearly refutes Respondent's misstatements that the Board

- **a. decides harsher penalties for federal employees,**
- **b. could not have imposed a lesser penalty on Petitioner if he had been a federal employee, and**
- **c. has an identical standard of culpability for both federal and state employees.**

Respondent has clearly failed to meet the Rule 15 requirements that a brief in opposition "should address any perceived misstatement of fact or law in the petition," and "present other arguments for denying the petition." Petitioner is primarily challenging the Board's enforcement of the Act, and the Act's wording is a secondary consideration. Yet, from pages 6 to 15 Respondent exclaims the correctness of the Hatch Act's wording without offering any Board decisions to verify the Respondent claims. Finally, on page 18 Respondent states that the Board has "ordered removal in cases involving federal employees who, like petitioner, deliberately violated the prohibition on partisan candidacy." Then Respondent correctly listed Dominguez, and incorrectly listed Carney and Johnson. Unlike Petitioner and Dominguez, Carney and Johnson were formally warned by the OSC and they went on to violate the Act a second time. Pet. A 62. Only on page 18 does Respondent offer any actual Board decisions to verify Respondent's claims.

Since 1984 the Board has made decisions to penalize 10 federal employees for partisan candidacy, and it has ordered the removal of Dominguez, Carney and Johnson, which means termination for a federal employee. Petitioner has already discussed how Baker, Campbell and Edenfield were suspended instead of removed because they were formally warned. Petitioner's case is more like federal employees Bradford, Walker, Andrezjwski, and Reckard - all of whom were not formally warned and the

first three were suspended and Reckard allowed to retire (which is far better than dismissal). During that same time period the Board has decided that 25 of 25 state employees violated the Act by partisan candidacy, and the Board ordered the removal of 23 state employees and allowed 2 to retire instead of being removed. Pet. A58-62.

Petitioner has met the Rule 14(2) requirements to verify his assertions. Respondent inaccurately claimed that the Board decides harsher penalties for federal employees or less harsh penalties for state employees. Res. 6, lines 17-24; 8, lines 16-22; 9, footnote 5; 13, lines 15-16; 14, lines 19-21; and 15, lines 16-19. Respondent asserts a false distinction that some of the Board's decisions involving federal employees were "non-final decisions" without naming any actual cases, and somehow those decisions were not comparable to state employee decisions. Res. 9, footnote 5. The Board made those decisions, and its decisions are comparable. Conclusively, Petitioner's facts refute Respondent's claims. Pet 5, 15, 23-24 and A58-A62.

Respondent inaccurately claimed that the Board could not have imposed a lesser penalty on Petitioner if he had been a federal employee. Res. 7, lines 7-9; 12, lines 16-28, and 15, lines 16-19. Again, the Petitioner's facts refute those claims. Pet 5, 15, 23-24, 26-30 and A58-A62.

Respondent inaccurately claimed that the Board has an identical standard of culpability for both federal and state employees. Res. 10, footnote 5; 11, lines 16-19; and 12, lines 13-15. Again, the Petitioner's facts refute those claims, especially the manner in which the Board suspended Baker, Campbell, Edenfield, and also suspended Bradford, Walker, Andrezjwski. All those federal employees were candidates for partisan office and all were suspended, yet Petitioner and 24 other state employees were ordered removed. Pet 5, 15, 23-24, and A58-A62.

2. Respondent purposely reiterates factual misstatements by the Board, District Court, and Appeals Court that Petitioner correctly and extensively documented in initial briefs to District and Appeals Courts.

The Respondent wrongly asserted as facts many errors and misstatements first made in the Board's Final Decision, repeated in the District Court Opinion, and reiterated in the Court of Appeals decision. Petitioner provided extensive refutation of the Board's 102 errors and misstatements in his Formal Objection to MSPB's Factual Findings in its Final Decision. The Formal Objection was filed with the District Court on March 21, 1997, and again filed in the Joint Appendix (pages 841-860) for the Court of Appeals on March 4, 1998. Relevant portions of the Formal Objection appear as Appendix G, BR A4-A9, and full copies of the Formal Objection have been "lodged in" with the Clerk of the Supreme Court. The Respondent's wrong assertions in quotation marks followed by the facts include:

Res. 3, line 33 to 4, line 2 "..he did not find Servais' and Weintraub's explanations satisfactory because they did not provide written verification or legal citations.." Respondent did not state that almost half of their explanations were wrong, and many others were not verified. (BR A8)

Res. 4, lines 23-25 "..an OSC investigator ...further explained the Hatch Act to him." The investigator only clarified Petitioners misunderstanding about the withholding of twice his annual salary. (Pet. 10, A54, A57, item 19)

Res. 5, lines 2-4 "..petitioner not be removed from his job because OSC failed to take a more active measure to dissuade him from violating the Act." The federal ALJ wrote that "the actions of the Petitioner [OSC] significantly contributed to Respondent's [Alexander] assumption of the risk." (Pet. 8, A36, A49-A51, and BR A8)

Res. 6, lines 12-16 "petitioner lacked standing to raise an equal protection challenge to the penalty provisions

because he was not harmed by the differences he sought to challenge..." Similar misstatements appear on p. 12, lines 33-35. Compared to federal employees Bradford, Walker, Andrezjwski, and Reckard, Petitioner was harmed due to the different penalties for state and for federal employees.

Res. 12, lines 10-11 "He was repeatedly warned." OSC Public Information Officer Paul Ellis explained the difference between opinions without verification, such as Petitioner received, and formal OSC warnings. (Pet. 10, A54, BR A8, p. 11, line 22)

Res. 16, line 26 "He was perfectly willing to violate the Hatch Act." ALJ declared the exact opposite. (A54-57, BR A8, p. 11, line 22)

Res. 18, last line "Petitioner was told by everyone that he could not be a candidate without violating the Act." Most said they did not know. Only Servais and Weintraub stated he was covered, and they did not verify their opinions. (BR A9, p 17, li 20)

3. Respondent purposely misstates the significance of the different *Olenhouse* interpretations by the Fifth, Sixth and Tenth Courts of Appeals.

CONCLUSION

WHEREFORE, Petitioner requests that this Court issue its writ of *certiorari* to the United States Circuit Court of Appeals for the Sixth Circuit to review the decision of that Court in Petitioner's case.

Respectfully Submitted,

George V. Warren (P21996)
Counsel of Record
847 W. Willow, Nandy House
Lansing, Michigan 48906
(517) 484-5050

EXHIBITS BY PETITIONER

F. CITATION OF SUPPLEMENTAL AUTHORITY

George V. Warren, Attorney
847 W. Willow
Lansing, Michigan 48906
517-484-5050

October 23, 1998

Leonard Green, Clerk
US Court of Appeals, Sixth Circuit
Potter Stewart U.S. Courthouse
100 East Fifth Street, Room 532
Cincinnati, Ohio . 45202-3988

Eric D. Flores
Merit System Protect'n Board
1120 Vermont Ave, NW,
Suite 816
Washington, D.C. 20419

David Gorman
Office of Special Counsel
1730 M Street, N.W.,
Suite 300
Washington, D.C. 20036

Michael Hayes Dettmer,
U.S. Attorney
Southern Division
P O Box 208
Grand Rapids, Michigan 49501

Janet Reno,
U.S. Attorney General
10th & Constitution Ave, NW
Washington, DC 20530

William Kanter and Carl E. Goldfarb
Civil Division, Appellate Staff
US Department of Justice
601 D Street, N. W., Rm 9541
Washington, D.C. 20530-0001

RE: **CITATION OF SUPPLEMENTAL AUTHORITY**
97 - 2131 Alexander v. Merit Systems Protection Board
District Court No. 5: 96-CV-180

Dear Mr. Green:

The Appellant, Robert D. Alexander, would like to cite to the Court supplemental authority. The cases Appellant wishes to cite to the Court are SPECIAL COUNSEL v. DeMEO [77 M.S.P.R. 158 (1997)] and SPECIAL COUNSEL v. McDONALD [77 M.S.P.R. 675 (1997)].

The Appellant cites the Court in SPECIAL COUNSEL v. DeMEO specific pages 160, 161, 162, 166, 167, 168, and 173, and the excellent overall Analysis from pages 160-174 of the penalty provisions for federal employees who violate the Hatch Act. The reason Appellant cites this supplemental authority is because Appellant did not find a similar Analysis by the M.S.P.B. of the penalty provisions for state employees who violate the Hatch Act in any of the Board's 33 Final Decisions against state employees from 1984 to 1997. The specific items are:

page 160 "We find that this statutory prohibition....is ambiguous on its face, and is susceptible of several plausible interpretations." For state employees "coverage" by the Hatch Act, "violation" of the Act, "removal" and other words in the statute are equally "ambiguous on its face, and is susceptible of several plausible interpretations."

pp. 161-162 "debarment is a penalty, and a severe one." "when a statute imposes penalties, 'it must do so in clear terms to avoid unfairness [and]arbitrary enforcement.' " "...in favor of persons on whom penalties are sought to be imposed." "...not construing statutes in favor of the offender violate due process." "[W]here there is doubt concerning the severity of the penalty prescribed by a statute, a milder penalty over a harsher one will be favored." "permanent debarment from federal employment is "punishment ... of a most severe type," which Congress invoked only for "special types of odious and dangerous crimes." United States v. Lovett,"

p. 166 The Analysis stated that "Congress used explicit language to debar State and local employees from future employment, precisely specifying both the scope of the debarment and its

duration." Appellant's Briefs and Addendum B demonstrate that the penalty for state employees has NOT been precisely applied.

p. 167 "the mandatory penalty" [of termination for federal employees] "was too harsh for minor or inadvertent violations of the Act," so a suspension of at least ninety days was added.

p. 168 "..the 1950 Congress believed that the effect of a removal [of a federal employee] for violation of the Hatch Act was a complete and permanent debarment from all federal employ-ment. There is no explanation in the legislative history..." Appellant found extensive verification of permanent termination in the 1939 Congressional Record of the testimony during debate.

p. 173 "...in all Board cases where the penalty of removal was imposed" [on federal employees] "for violation of the Hatch Act, no debarment was imposed. See Lee, 58 M.S.P.R. at 93; Dominguez, 55 MSPR 652, 653 (1992); Johnson, 26 MSPR 562.."

The Appellant cites the Court in SPECIAL COUNSEL v. McDONALD the following specific statement on page 677, "..McDonald would resign from his employment with OMRDD effective June 4, 1997; that, thereafter, he would be debarred for eighteen months from reemployment in any position in a State or local agency in the State of New York." Appellant asserts that the penalty for state employees so clearly stated in McDonald, debarred for eighteen months, did not appear in any of the prior 33 Board decisions for state or local employees from 1984 to 1997.

Also, Appellant acknowledges that his Olenhouse Motion and Brief in Support were mistakenly placed in reverse order on pages 824 to 821 in the Joint Appendix.

Respectfully submitted,

George V. Warren (P 21996)
Attorney for the Plaintiff-Appellant
Robert D. Alexander

G. **Petitioner's Formal Objections to MSPB's Factual Findings in its Final Decision, filed March 21, 1997, in U.S. District Court and filed March 4, 1998, in U.S. Sixth Circuit Court of Appeals.**

{ note: Complete copies of Appendix G were lodged in with the Clerk of the Supreme Court on July 23, 1999. Appendix G refers extensively to the federal Adm. Law Judge's Recommended Decision (RD). RD pages 56-57 and 65-72 are App. D to the Petition, A46-57, and full copies of the RD were lodged in with the Clerk of the Supreme Court on April 12, 1999. In the Formal Objections below, when RD pages are cited that appear in App. D, the App. D page numbers are listed as "{A47}." }

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT D. ALEXANDER,
Petitioner

v. No.
MERIT SYSTEMS PROTECTION BOARD 5:96-CV-180
and OFFICE OF SPECIAL COUNSEL,
Respondents.
_____/

PETITIONER ALEXANDER'S FORMAL OBJECTIONS TO THE MERIT SYSTEMS PROTECTION BOARD'S FACTUAL FINDINGS IN ITS FINAL DECISION AND ORDER

The Petitioner, Robert Alexander, hereby submits through his Attorney, George Warren, the following formal objections to the Merit Systems Protection Board's (MSPB) factual findings in its FINAL DECISION AND ORDER, issued October 4, 1996, in the above-captioned matter.

I. INTRODUCTION

Pursuant to 5 U.S.C. § 1508 this Court shall review the entire record including questions of fact and questions of law, in response to Mr. Alexander's PETITION FOR JUDICIAL REVIEW ... of the MSPB's FINAL DECISION (FD) and MOTION FOR STAY of the MSPB's removal ORDER. This Court has ordered a stay and Petitioner has been suspended by his Department of Community Health (DCH).

Petitioner Alexander submits that these objections of the MSPB's factual findings will refute the Board's version of the facts, and its findings based those facts, which are not supported by substantial evidence in the record. Petitioner will more than exceed the applicable substantial evidence standard of review as stated by Respondent MSPB in its MOTION TO AFFIRM, p. 12. ... Under this standard, this Court must deny the Board's factual findings if they are not supported by substantial evidence in the record. Arkansas v. Oklahoma, 503 U.S. 91, 113 (1992). Petitioner will refute most of the Board's findings in his verification of the actual facts in this matter. Petitioner has not just identified alternative findings that may also be supported by substantial evidence. (Ibid., 113) Petitioner's actual facts, and not the Board's version of the facts, will meet the substantial evidence standard that "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Pernales, 402 U.S. 389, 401 (1971). Consequently, Petitioner asserts that the Board **did abuse** its discretion in determining that Mr. Alexander's alleged violation of the Hatch Act warranted his removal.

II. ARGUMENT

A page by page, line by line review of MSPB's FINAL DECISION will reveal the false nature of the facts asserted by the Board and the true nature of the actual facts as verified by Petitioner. In this review Petitioner Alexander is Respondent, the Respondent MSPB is the Board, and the Respondent OSC is Petitioner. The format for this analysis will be:

Page number, Line number, "false assertion by the Board"[actual fact by Petitioner, verification of the fact].

p. 2, li. or ls. 7 "violation warranted removal" [mitigation merited retaining position, RD pp. 71-72]

The critical false word or words in a MSPB or OSC assertion often will be bolded for emphasis. ...

Included in the 102 errors are 12 misquotes of the ALJ that are totally opposite of his statements:

p. 4, ls. 1-2 "this experience engendered in him **the attitude** that he would not accept the legal opinions of others absent supporting legal citations. See RD 31-32, 57." [actual RD p. 57- "he perceived that he had reason to distrust his agency's Human Resources Office and its advice. Respondent's distrust was based on a number of DSS actions..."] {A48}

p. 11, li. 22 to p. 12, li. 1 "ALJ found that Mr. Alexander knowingly and willfully violated the Hatch Act by pursuing his candidacy in the face of **many warnings** to the contrary." ["While the admonitions received by Respondent (from Kemp, Servais and Weintraub) are insufficient in and of themselves to prove that Respondent knowingly and willfully violated the Hatch Act...."RD p. 67.] {A51}

p. 15, li. 16 to p. 16, li. 3 "ALJ found that Mr. Alexander knowingly and willfully violated the Hatch Act because the warnings Mr. Alexander received from his supervisor....and OSC were sufficient to notify a reasonably prudent person that his candidacy would violate the Hatch Act." [Ibid. and "the advice of Dr. Kemp...is of little weight in supporting removal." and "Servais' actions and advice do not support removal." RD p. 68.] {A52-A53}

p. 16 ls. 5-6 "This conclusion is incorrect" that Kemp, Servais and Weintraub were insufficient in themselves to prove

Respondent violated the Act. [Ibid. and "OSC's actions do not support removal." RD at 69.] {A53}

p. 17 ls. 7-9 "The record fully supports the ALJ's finding that Mr. Alexander knowingly and willfully violated the Hatch Act." [Ibid.] {A53}

p. 18 ls. 8-10 "We reject the ALJ's conclusion that the advice of Mr. Weintraub, Mr. Servais, and Dr. Kemp cannot support a determination that removal is warranted." [Ibid.] {A53}

p. 18 ls. 10-11 "ALJ's findings of fact....not supported by the record." [Ibid.] {A53}

p. 18, li. 18 to p. 19, l. 1 ALJ criticized "Weintraub's warning merely because she was abrupt or because she did not provide him an unsolicited written opinion." [Ibid.] {A53}

p. 19 ls. 5-8 He disregarded advice of his agency's personnel office and his supervisor because "he success-fully challenged a personnel action in the past." [Ibid.] {A53}

p. 19 ls. 11-12 Kemp and Servais' advice was "correct and consistent with that of each other and with that of Ms. Weintraub." [Ibid.] {A53}

p. 19 ls. 15-16 and footnote 5 "**We find no evidence** of a political attempt by DSS to have Mr. Alexander prosecuted."[ALJ did find evidence. RD pp. 64, 65, 68.] {A48, 52-53}

p. 22 ls. 3-5 "His selective crediting of the advice he received cannot be justified by his purported standard of requiring supporting legal citations." [His "efforts to get clarification regarding the Hatch Act were symbolic of Respondent's doggedness and hard headedness which Dr. Kemp indicated that Respondent employs on every issue." RD p. 57.] {A47-48}

Formal Objections to the MSPB's Factual Findings in the FINAL DECISION AND ORDER

p. 2, line 7 "his violation was of such a scope and effect as to **warrant removal** from his position." [The ALJ who heard all the testimony and wrote 70 page, single-spaced RD recommended that the "**Board impose no sanction**." p. 72] {A57}

p. 2, ls. 18-19 "The written record, along with the testimony introduced at two hearings, reflects the following, **largely uncontested** facts:" [Respondent does not contest the facts listed on page 3, lines 1-14, but much of the remainder of FD's BACKGROUND section to page 13, line 7, is vigorously contested by the Respondent!].

p. 11, li. 22 to p. 12, li. 1 "ALJ found that Mr. Alexander knowingly and willfully violated the Hatch Act by pursuing his candidacy in the face of **many warnings** to the contrary." [**ALJ wrote the exact opposite! "While the admonitions received by Respondent (from Kemp, Servais and Weintraub) are insufficient in and of themselves to prove that Respondent knowingly and willfully violated the Hatch Act**...." RD at 67, {A51} ls 2-4. OSC's Ellis explained the difference between an "opinion" and a "warning" from OSC. Tr. I, p. 256 The **Respondent received no warnings**.] [ALJ declared the testimony of both Mr. Kemp and Mr. Servais as not credible. ALJ stated the Respondent was covered by the Hatch Act, but that **he did not knowingly and willfully violate the Hatch Act due to OSC:** not answering his questions in April 1992, not issuing him a written warning after OSC became aware of his candidacy, and not telling him of the option to drop out of the race and OSC would end its investigation of him (as was done in Kelley). RD at 63-67.] {A48-51}

p. 15, li. 16 to p. 16, li. 3 "ALJ found that Mr. Alexander knowingly and willfully violated the Hatch Act because the warnings Mr. Alexander received from his supervisor....and OSC were sufficient to notify a reasonably prudent person that

his candidacy would violate the Hatch Act." **[ALJ stated the opposite, RD at 67; .....]** {A51}

p. 17 ls. 7-9 "The record fully supports the ALJ's finding that Mr. Alexander knowingly and willfully violated the Hatch Act." **[ALJ stated the opposite!** See p. 11, li. 22 above.] {A51}

p. 17 ls. 8-9 "Mr. Alexander does not challenge that finding." (no citation) **[FD statement could be no farther from the truth** as demonstrated throughout this proceeding. Respondent provided many exhibits and specifically challenged the alleged violation of the Hatch Act in the Trial Brief By Respondent, Argument by Respondent #1 Was Respondent Covered by the Hatch Act? pp. 1-7; #2 Did Respondent knowingly and willfully violate the Hatch Act?....]

p. 17 li. 20 "No one advised him to the contrary." (no citation) [If government officials do not verify their statements, their opinions are not law. Servais and Weintraub, as Hatch Act experts, were expected to verify their opinions and they did not do so. Also, Respondent provided extensive testimony that others did provide materials that questioned if DSS or Medicaid reimbursed employees were covered by the Hatch Act. Trial Brief, Stipulations by Respondent, Leland pp. 11, 15; MI Dept. of Civil Service p. 11; Gary Gordon p. 14; .]

Respectfully submitted,

Dated: March 21, 1997

George V. Warren,
Attorney for Petitioner,
Address: 412 W. Grand River Ave.,
Lansing, Michigan, 48906
Telephone: 517-482-7751